

REMARKS

Response to Restriction Requirement

The Office Action required restriction to one of Groups I-III, provided *infra*, which are purportedly distinct inventions under 35 U.S.C. § 121. The Office Action requires that Applicants elect one of the following three (3) allegedly distinct inventions:

Groups I-III are as follows:

Group I: Claims 1-17, drawn to a method of reducing the risk of infection, classified in class 424, subclass 93.6.

Group II: Claims 18-23, drawn to a method for reducing the incidence of VRE infection in a medical facility, classified in class 424, subclass 93.6.

Group III: Claims 24-28 drawn to bacteriophages, classified in class 435, subclass 235.1.

Applicants hereby provisionally elect Group I, which covers claims 1-17, drawn to, according to the Office Action, a method of reducing the risk of infection, **with traverse**, and respectfully request reconsideration of the restriction requirement in view of the following remarks.

Applicants respectfully urge that the Restriction Requirement is improper, as it does not establish that searching all the inventions would constitute an undue burden on the Patent Office. Accordingly, Applicants submit that the Restriction Requirement is improper and should be withdrawn or at least modified.

According to the Manual of Patent Examining Procedure ("M.P.E.P."), when claims can be examined together without undue burden, the U.S.P.T.O. must examine the claims on the merits even though they are directed to independent and distinct inventions. *See* M.P.E.P. at § 803. In establishing that an "undue burden" would exist for co-examination of claims, the U.S.P.T.O. must show that examination of the claims would involve substantially different prior art searches, making the co-examination burdensome. To show undue burden resulting from searching difficulties, the U.S.P.T.O. must show that the restricted groups have a separate classification, acquired a separate status in the art, or that searching would require different fields of search. *See* M.P.E.P. at § 808.02.

Applicants submit that it would not constitute an undue burden to examine the inventions of Groups I and II together. The inventions of Groups I and II, while patentably distinct from each other, are related to each other by subject matter, *e.g.*, treatment of bacteriophage(s) to patients. Indeed, the search within each of Groups I and II would necessarily overlap because Groups I and II both encompass methods of reducing the risk of infection comprising administering bacteriophage(s) to a patient. In particular, a search of claim 2 (Group I), drawn to reducing the level of colonization with pathogenic bacteria by at least one log and claims 5 and 6 (Group I), drawn to producing lytic infections in VRE, would overlap with the search of claim 18 (Group II), drawn to reducing the number of VRE in experimentally infected mice by at least one log. Accordingly, it would not constitute an undue burden to examine Groups I and II together.

Applicants further submit that Groups I and II should be examined together because both groups are classified in class 424, subclass 93.6, demonstrating that they have not attained recognition in the art as separate subject matter or a separate field of search. The M.P.E.P. makes clear that if inventions are classified together, the Examiner must make an additional showing in order to require restriction:

Even though they are classified together, each invention can be shown to have formed a separate subject for inventive effort when the examiner can show a recognition of separate inventive effort by inventors. Separate status in the art may be shown by citing patents which are evidence of such separate status, and also of a separate field of search.

See M.P.E.P. § 808.02. Applicants respectfully submit that the Examiner has not made this additional showing and therefore respectfully request that Groups I and II be examined together.

In view of the above remarks, it is respectfully requested that the Restriction Requirement be withdrawn and that all claims be allowed to be prosecuted in the same patent application. In the event that the requirement is made final and in order to comply with 37 C.F.R. § 1.143, Applicants reaffirm the election with traverse of claims 1-17 (Group I).

CONCLUSION

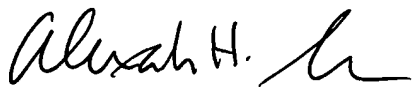
In view of the above remarks, early notification of a favorable consideration is respectfully requested.

A check is enclosed in the amount of \$1,080.00, which covers the five-month extension of time fee. The Commissioner is hereby authorized to charge any additional fees which may be required, or credit any overpayment, to **Deposit Account No. 50-0206**.

Respectfully submitted,

Dated: September 21, 2006

By:


Laurence H. Posorske
Registration No. 34,698

Alexander H. Spiegler
Registration No. 56,625

HUNTON & WILLIAMS LLP
Intellectual Property Department
1900 K Street, N.W., Suite 1200
Washington, DC 20006-1109
(202) 955-1500 (telephone)
(202) 778-2201 (facsimile)

LHP/AHS:sac